KL Engineering Sdn Bhd & Anor v Arab Malaysian Finance Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 04-8-1990
JEMURI SERJAN CJ (BORNEO), EDGAR JOSEPH JR AND MOHAMED DZAIDDIN SCJJ
9 MARCH 1994

Companies and Corporations *— Suit against company — Hire-purchase agreement purported to be signed on behalf of company — Defence that signatory was not director of company and had no authority to sign on behalf of company — Whether doctrine of constructive notice applicable to Form 49 of the Companies Act 1965 — Companies Act 1965 Form 49*

Companies and Corporations *— Suit against company — Hire-purchase agreement purported to be signed on behalf of company — Defence that signatory was not director of company and had no authority to sign on behalf of company — Whether plaintiff should have conducted company search — Whether company bound by agreement — Companies Act 1965*

Civil Procedure *— Appeal — Grounds — Submission of counsel — Counsel conceded that there was insufficient evidence against defendants — Whether trial judge should have dismissed claim*

The respondent, a licensed finance company, sued the first appellant as hirer of equipment under a hire-purchase agreement, purportedly signed by the second appellant, Kow Ah Onn, and Kow Yuen Wah, the second defendant in the court below. The main defence of the appellants in the sessions court was the lack of authority of Kow Yuen Wah to execute the hire-purchase agreement on behalf of the first appellant, as he had ceased to be a director of the company. It was argued that the respondent should have conducted a search at the Registry of Companies as it would have shown that Kow Yuen Wah had retired as a director on 27 February 1982. In this regard, it was submitted that the doctrine of constructive notice applied to Form 49 of the Companies Act 1965 ('the Act') which was the register of particulars of directors, because it is a public document which is for public inspection by persons dealing with the company.

In the sessions court, counsel for the respondent at that time, conceded that there was insufficient evidence against the first appellant, but the judge of the sessions court gave judgment for the respondent without making a finding on whether Kow Yuen Wah had acted without the authority of the first appellant. The appellants' appeal to the High Court was dismissed and they appealed to the Supreme Court on the grounds that: (a) the judges in both courts below failed to consider that the first appellant, as a body corporate, could only act through authorized persons and that Kow Yuen Wah was not such a person; and (b) the sessions court judge failed to consider the 'concession' made by counsel for the respondent that there was

insufficient evidence against the first appellant and ought to have dismissed the claim. A

Held, allowing the appeal:

(1) The common law doctrine of constructive notice should apply to Form 49 which is a public document containing particulars of directors who are the mind and will of the company as well as managers and secretaries who are responsible for the day-to-day running of the company. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any time. B

(2) As Form 49 is a public document to which the common law doctrine of constructive notice applies, the respondent, who had been put upon inquiry of its contents, but failed to check, must be presumed to have known that Kow Yuen Wah was not a director of the first appellant and was therefore, not authorized to sign the hire-purchase agreement on the company's behalf. Accordingly, as the hire-purchase agreement was signed by an unauthorized person on behalf of the first appellant, the latter could not be made liable under the hire-purchase agreement. C D

(3) The 'concession' of the respondent's counsel in the court below that there was insufficient evidence against the first appellant merely went to show a weakness in the respondent's case. In practice, it is still the duty of the trial judge to examine and evaluate the entire evidence before he can come to a conclusion that the evidence led against a defendant is so unsatisfactory or unreliable for him to hold that the plaintiff has not proved his case. However, in view of the court's primary finding on the first ground of appeal, it was not necessary to decide on the second ground. E F

[Bahasa Malaysia summary

Responden, sebuah syarikat kewangan berlesen, telah mendakwa perayu pertama sebagai penyewa jentera di bawah suatu perjanjian sewa-beli, yang kononnya telah ditandatangani oleh perayu kedua, Kow Ah Onn, dan Kow Yuen Wah, defendan kedua di mahkamah bawah. Pembelaan utama perayu-perayu di mahkamah sesyen adalah ketiadaan kuasa pada pihak Kow Yuen Wah untuk menyempurnakan perjanjian sewa-beli itu bagi pihak perayu pertama, oleh kerana beliau tidak lagi merupakan pengarah syarikat itu. Telah dihujahkan bahawa responden seharusnya menjalankan suatu carian di Pejabat Pendaftaran Syarikat kerana carian itu akan menunjukkan bahawa Kow Yuen Wah telah bersara sebagai seorang pengarah pada 27 Februari 1982. Berkenaan dengan ini, telah dihujahkan bahawa doktrin notis konstruktif terpakai kepada Borang 49 Akta Syarikat 1965 ('Akta itu') iaitu daftar butir-butir pengarah, kerana ianya merupakan suatu dokumen awam untuk pemeriksaan awam oleh orang yang berurusan dengan syarikat itu. G H I

Di mahkamah sesyen, peguambela pihak responden pada masa itu, telah membuat konsesi bahawa tidak terdapat keterangan yang mencukupi terhadap perayu pertama, tetapi hakim mahkamah sesyen telah memberi penghakiman yang memihak kepada responden tanpa membuat keputusan mengenai sama ada Kow Yuen Wah telah bertindak tanpa kuasa perayu pertama. Rayuan perayu ke Mahkamah Tinggi telah ditolak dan mereka telah membuat rayuan ke Mahkamah Agung atas alasan bahawa: (a) hakim di kedua-dua mahkamah bawah telah gagal mempertimbangkan bahawa perayu pertama, sebagai suatu badan korporat, hanya boleh bertindak melalui orang yang telah diberikuasa dan bahawa Kow Yuen Wah bukanlah orang sedemikian; dan (b) hakim mahkamah sesyen gagal mempertimbangkan 'konsesi' yang dibuat oleh peguambela pihak responden bahawa tidak terdapat keterangan yang mencukupi terhadap perayu pertama dan beliau sepatutnya menolak tuntutan itu.

Diputuskan, membenarkan rayuan itu:

(1) Doktrin common law mengenai notis konstruktif seharusnya terpakai kepada Borang 49 yang merupakan suatu dokumen awam yang mengandungi butir-butir mengenai pengarah-pengarah, yang menjadi minda dan nafsu syarikat itu dan juga pengurus dan setiausahanya yang bertanggungjawab untuk pengurusan harian syarikat itu. Oleh itu, orang yang berurusan dengan syarikat itu hendaklah memastikan dengan Pendaftar Syarikat siapa yang merupakan pengarah, pengurus dan setiausaha syarikat itu pada sebarang masa yang berkenaan.

(2) Oleh kerana Borang 49 adalah suatu dokumen awam yang tertakluk kepada doktrin notis konstruktif, responden yang seharusnya mempersoalkan kandungan borang itu, tetapi gagal memastikan kebenarannya, hendaklah dianggap sebagai mengetahui bahawa Kow Yuen Wah bukan seorang pengarah perayu pertama dan oleh itu, tidak diberikuasa untuk menandatangani perjanjian sewa-beli itu bagi pihak syarikat itu. Dengan demikian, oleh kerana perjanjian sewa-beli itu telah ditandatangani oleh seorang yang tidak diberikuasa untuk bertindak bagi pihak perayu pertama, perayu pertama tidak boleh dijadikan bertanggungan di bawah perjanjian sewa-beli itu.

(3) 'Konsesi' yang dibuat oleh peguambela responden di mahkamah bawah bahawa tidak terdapat keterangan yang mencukupi terhadap perayu pertama hanya menunjukkan kelemahan di dalam kes responden. Mengikut amalan, ianya masih merupakan kewajipan hakim perbicaraan untuk memeriksa dan menilai kesemua keterangan sebelum beliau dapat membuat keputusan bahawa keterangan terhadap seseorang defendan begitu kurang memuaskan atau tidak boleh dipercayai sehingga beliau memutuskan bahawa plaintif tidak membuktikan kesnya. Bagaimanapun, memandangkan keputusan utama mahkamah berkenaan dengan alasan rayuan pertama, keputusan mengenai alasan kedua tidak perlu dibuat.]

Cases referred to

1 *Woodland Development Sdn Bhd v Chartered Bank* [1986] 1 MLJ 84 (refd)
2 *Dart Sum Timber (Pte) Ltd v The Bank of Canton Ltd* [1982] 2 MLJ 101 (refd)
3 *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886 (refd)
4 *Morris v Kanssen* [1946] AC 459 (refd)

Legislation referred to

Companies Act 1965 s 141

Appeal from: Civil Appeal No R8–12–116–89 (High Court, Kuala Lumpur)

Choong Hor Kiow (*PL Tan & Mah*) for the first appellant.
Guy Varegheese (*Richard Ho & Co*) for the second appellant.
Jennifer Tay (*SK Tay & Co*) for the respondent.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This is an appeal by KL Engineering Sdn Bhd ('the first appellant'), a private limited company incorporated in Malaysia under the Companies Act 1965 ('the Act'), carrying on business at No 47, Jalan SS20/11, Petaling Jaya, from the decision of the High Court Kuala Lumpur given on 27 February 1990, dismissing an appeal against the decision of the sessions court judge in Kuala Lumpur dated 17 May 1989. The appeal was originally brought by the first and second appellant, but at the outset of the hearing of this appeal, Encik Guy Varegheese, counsel for the second appellant, withdrew the latter's appeal. Accordingly, we struck out the second appellant's appeal with costs.

The factual background to the action at the Kuala Lumpur Sessions Court was as follows. The respondent, a licensed finance company, sued the first appellant as hirer of one unit of Nikko Concrete Batching Plant ('the equipment') under a hire-purchase agreement ('P7') purported to have been signed by the second appellant and Kow Yuen Wah on 13 September 1986. Both the second appellant and Kow Yuen Wah had also on the same date executed a letter of guarantee ('P13'). When the first appellant defaulted in the payment of the monthly instalments and failed and/or neglected to return the equipment to the company upon notice of termination of hire being served on the three defendants, the respondent commenced action against them, praying for judgment in the sum of RM31,007.48 and for the return of the equipment.

The main defence of the three defendants in the court below, including that of the first appellant, was the lack of authority on the part of the second defendant, Kow Yuen Wah, to execute P7 on behalf of the first appellant. Paragraph 6 of the defence states:

A Further or alternatively, the first defendant contend that one of the persons purporting to sign for the first defendant is the second defendant who was at all material times not a director of the first defendant. The second defendant was at all material times not authorized to act for or on behalf of the first defendant in any matter.

B At the trial, Ms Beh Soak Heang (PW1), the marketing assistant of the respondent company, testified that at the material time, she was a clerk at the Petaling Jaya branch office in charge of hire-purchase agreements. Her duty was to process the documents after loans were approved. On the material day, she received from the first appellant an application form dated 8 September 1986 (P1), together with the company's memorandum and C articles of association (P2), Form 24 (P3) and Form 49 of the Act (P4) for processing. When the first appellant's loan was approved on 13 September 1986, she called in the directors, whom she identified as the second appellant and his brother, James Kow Yuen Wah, to sign P7 as directors of the company. After verifying their identities, both persons signed P7 and P13 in her presence. Under cross-examination, she stated that the officer in D charge of approving loans was Kenneth Wong (who was not called as a witness). She did not know whether Mr Wong had checked the documents with the Registrar of Companies before handing them to her. However, she admitted that she did not check the authenticity of any of these documents.

Mr Kow Sak Chow (DW1), the managing director of the first appellant, E testified that Kow Yuen Wah was a director of the company until 1982. At this stage, another copy of Form 49 (D14) was produced and shown to DW1 who stated that this form was filed in the Registry of Companies by his secretary. According to him, in 1986, Kow Yuen Wah was not a director of the first appellant. He denied that the first appellant had entered into any hire-purchase agreement with the respondent.

F The second appellant testified to the effect that at the material time, he was a director of the first appellant, but denied that the signatures on P7 and P13 were his. He also stated that he had not purchased any machinery on behalf of the first appellant from the respondent.

From the evidence, it is of particular importance to note that there were G two Form 49 before the court. Form 49 is a return of particulars of directors, managers and secretaries and changes of particulars required to be lodged with the Registrar of Companies under s 141(6) of the Act. One was *P4* which was dated 27 September 1980 with the name Kow Yuen Wah as one of the directors, and the other was *D14* dated 24 March 1986, where under the column, 'Nature of change', it is stated that Kow Yuen Wah H retired at the AGM held on 27 February 1982.

After hearing submissions of counsel and in spite of the concession by the plaintiff's counsel that the 'plaintiff has insufficient evidence against KL Engineering Sdn Bhd', the sessions court judge found the case for the respondent. In her brief ground of decision, her Honour made reference to I the main defence when she stated:

In the statement of defence of the first and third defendants they deny executing the hire-purchase agreement and contend that the second defendant was not at the material time a director of the first defendant and therefore was not authorized

to act on behalf of the first defendant. The first defendant further contend that the common seal used on the agreement is a forgery. A

However, she made no finding on this crucial issue raised by the appellants. Instead, she accepted the evidence of PW1 and concluded as follows:

PW1 had said in her evidence that the second and third defendants executed the documents before her and there is no evidence to the contrary. The burden of proving that exh P13 is a forgery fell on the defendants. B

After considering the documentary and oral evidence I conclude that the defendants had failed to discharge this onus. I therefore gave judgment to the plaintiff.

Against the above judgment, the appellants appealed to the High Court. C His Lordship found no reason to disagree with the finding of the lower court that the first appellant did execute the hire-purchase agreement, P7, and the second appellant executed the guarantee, P13. However, the crucial issue of whether Kow Yuen Wah had acted with or without the authority of the first appellant was not considered by the learned judge. Nor was the issue of 'concession' made by counsel for the respondent. Hence, the D present appeal.

Before us, the appeal was argued mainly on two grounds. The first and important ground was that the learned judges in both courts below failed to consider that the first appellant, being a body corporate, could act only through authorized persons and that the hire-purchase agreement, P7, was E executed by a person who had no authority to act and who was not a director of the first appellant at the material time. Secondly, the learned sessions court judge failed to consider the 'concession' made by counsel for the respondent at the outset of the submissions of counsel that there was insufficient evidence against the first appellant and ought to have dismissed the respondent's claim against the company at the conclusion of the trial. F

On the first ground, Cik Catherine Choong, counsel for the first appellant, submitted that from the evidence, it was clear to the court that James Kow Yuen Wah, the second-named defendant, who signed the hire-purchase agreement, P7, on 13 September 1986 was not a director of the first appellant but only a shareholder at the material time. Counsel pointed out G that PW1 merely relied on the 'older' Form 49 (P4) which was about six years old from the material date showing that James Kow Yuen Wah was a director of the company. The first appellant should have conducted a search at the Registry of Companies to check the particulars of directors. Had it done so, it would have obtained a more recent return, D14, which H would show that Kow Yuen Wah retired as a director on 27 February 1982. In this regard, counsel submitted the doctrine of constructive notice applied to Form 49 because it is a public document which is for public inspection by persons dealing with the company.

Counsel referred us to a passage in *Charlesworth & Cain on Company Law* by Geoffrey Morse under Ch 20 'Protection of Outsiders' at p 433, I which states:

A person dealing with a company, even if he does not have actual notice, has constructive notice of the contents of its public documents, such as the

A memorandum and articles, special resolutions, register of charges *and, presumably, list of directors* because they are open to public inspection at the Company's Registration Office ... (Emphasis added.)

Counsel also relied on a passage in the judgment of Gunn Chit Tuan J (as he then was) in *Woodland Development Sdn Bhd v Chartered Bank*,[1] where at
B p 88, his Lordship stated:

... I ought to pause here to consider briefly the law relating to the doctrine of constructive notice in relation to delegated authority. That doctrine was that since the memorandum and articles of a company are public documents and open to public inspection, anyone who had dealings with the company must be taken to have notice of the contents of those documents whether he had read
C them or not.

Another case referred to was *Dart Sum Timber (Pte) Ltd v The Bank of Canton Ltd*,[2] a Singapore Court of Appeal case on an ostensible authority of a managing director. The trial judge found Wong Kee Loh was the managing director of Dart Sum and therefore had the authority, express or implied, to
D execute the guarantee. The Court of Appeal, in allowing the appeal of the company after considering the evidence, found that Wong was the chairman and not the managing director. It held that Dart Sum was not liable under the guarantee as Wong had no actual authority to provide the guarantee.

Cik Jennifer Tay, for the respondent, argued that the doctrine of
E constructive notice should not extend to the register of particulars of directors in Form 49. On the authority of *Woodland Development*,[1] she submitted this doctrine applied only to a company's memorandum and articles of association. She stressed that it would be dangerous to stretch the doctrine to Form 49 as this is a document which concerns the 'indoor management' of a company. On the authority of *Royal British Bank v*
F *Turquand*[3] or sometimes called the rule in *Turquand*'s case, counsel submitted the first appellant was bound by the contract, P7, since the respondent was entitled to assume that acts within the constitution of the company have been properly performed and that the necessary resolutions have been passed.

G In dealing with the first ground of appeal, the question is whether the common law doctrine of constructive notice extends to Form 49. In company law, constructive notice means that anyone dealing with a registered company is deemed to have notice of the contents of its public documents. According to *Gower's Principles of Modern Company Law* (5th Ed, 1992) at p 170, 'Precisely what that included was never wholly clear but it certainly included
H the memorandum and articles of association.'

Here, there is no difficulty in deciding that Form 49 is a public document. Section 141(1) of the Act requires every company to keep in its registered office a register of its directors, managers and secretaries. The register shall contain the full names, addresses, other occupations and identifications, if
I any, of the directors, managers and secretaries. The company shall lodge with the Registrar within one month after incorporation a return containing the aforesaid particulars. In addition, if there is any change, whether a person ceases to be, or becomes, a director, the company must lodge also within one month the prescribed return or notice with the Registrar (s 141(6)(b))

whose certificate stating that from any return lodged it appears that a person was at any specified time a director, manager or secretary of a company is prima facie evidence of the facts stated in the certificate. Finally, this register is open to inspection by not only members of the company but also any other person.

However, the next important question is whether Form 49 comes within the category of public documents upon which persons dealing with the company is deemed to have notice of its contents. The learned author of *Charlesworth & Cain on Company Law* is of the view that the doctrine applies *presumably* to the list of directors because it is a public document which is open to public inspection at the Registry of Companies. On the other hand, the learned author of 1 *Palmer's Company Law* (24th Ed) discussed the issue in more detail at para 21–02:

> It is sometimes not easy to determine which of the company's documents are public documents and which concern only its internal management. In principle only documents which are registered with the Registrar can be public documents, but, as we shall see, not all of them have this character.
>
> Obviously the memorandum and the articles are public documents. Special resolutions, if duly registered in accordance with s 380, likewise become public documents. The same would appear to apply to other resolutions required to be registered under s 380.
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> It would further appear that charges on the undertaking of the company or on specific property belonging to it, if registered according to s 395 et seq, are likewise public documents, but this applies only to the registered particulars and not to 'special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security'.
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> Beyond this no guidance can be obtained from decided cases on what are public documents of registered companies. It is thought that not all documents which a company has to register fall within that category. A distinction has to be drawn between documents affecting the powers of the company and its agents and other documents. Only documents which fall into the former category are public documents, eg the other resolutions — other than special resolutions — requiring registration under s 380 and particulars relating to the directors (see s 288), but documents falling within the second category, such as balance sheets or entries in the register of directors' interests (see s 325), are not, it is thought, 'public documents' because their purpose is merely to provide information of the financial position of the company or the interest of its managers in the company.

The conclusion that follows from the above opinion, with which we respectfully agree, is that the common law doctrine of constructive notice should apply to Form 49. To reiterate, Form 49 is a public document which contains particulars of directors who are the mind and will of a company, as well as managers and secretaries who are responsible for the day-to-day running of the company. It is a document which affects the powers of the company and its agents. Certainly, its purpose must be more than just to provide information about the company's directors, managers and secretaries. Therefore, persons dealing with the company should check with the Registrar of Companies who its directors, managers and secretaries are at any given time.

Cik Jennifer Tay has urged us to treat Form 49 as an 'indoor management' document so that the respondent could take advantage of the rule in *Turquand*'s case. This rule was stated by Lord Simonds in *Morris v Kanssen*[4] as follows (at p 474):

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and power have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.

According to his Lordship (at p 475):

> It is a rule designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he claims. This is clearly shown by the fact that the rule cannot be invoked if the condition is no longer satisfied, that is, if he who would invoke it is put upon his inquiry. He cannot presume in his own favour that things are rightly done if inquiry that he ought to make would tell him that they were wrongly done.

Based on Lord Simond's dictum, we say with confidence that the rule in *Turquand*'s case does not apply here. We hasten to add that as Form 49 (D14) is a public document to which the common law doctrine of constructive notice applies, the respondent, having been put upon inquiry of its content, but failed to check, must be presumed to have known that at the material time, James Kow Yuen Wah was not a director of the first appellant and was, therefore, not authorized to sign P7 on the company's behalf. Accordingly, as P7 was signed by an unauthorized person on behalf of the first appellant, the latter cannot be made liable under the hire-purchase agreement, P7.

With regard to the second ground of appeal, we would like to say, in passing, that the 'concession' of learned counsel for the respondent in the court below (certainly not Cik Tay) that there was insufficient evidence against the first appellant merely goes to show a weakness in the respondent's case. In practice, it is still the duty of the trial judge to examine and evaluate the entire evidence before he can come to a conclusion that the evidence led against a defendant is so unsatisfactory or unreliable for him to hold that the plaintiff has not proved his case. In the instant case, in our view, it must have been against the background of the evidence of PW1 and those of DW1, DW2 and DW3, however unsatisfactory it was, that led the trial sessions court judge to her finding, thereby disregarding even the 'concession' made by the respondent's counsel. However, since we have made our primary finding on the first ground of appeal, it would not be necessary for the determination of this appeal for us to decide on the second ground.

For reasons which we have stated above, we allow this appeal with costs here and below and set aside the judgments of the courts below. Lastly, we order that the deposit be refunded to the first appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim